

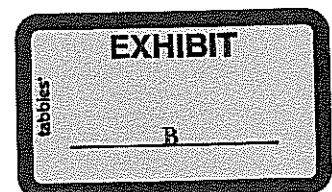
**COURT REPORTERS**  
**OF AKRON CANTON AND CLEVELAND**

Transcript of the Testimony of  
**Robert W. Vitale**

**Taken On:** February 19, 2008  
**Case Number:** 2:06-CV-2141-DGC

**Case:** Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF ARIZONA

- - -

SOILWORKS, LLC, an Arizona )	
corporation, )	
Plaintiff, )	
vs. )	CASE NO.
MIDWEST INDUSTRIAL SUPPLY, )	2:06-CV-2141-DGC
INC., an Ohio corporation )	ATTORNEYS' EYES
authorized to do business )	ONLY PORTIONS
in Arizona, )	CONTAINED WITHIN
Defendant. )	

- - -

Deposition of ROBERT W. VITALE, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Binnie Purser Martino, a Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the law offices of Vorys, Sater, Seymour and Pease, LLP, First National Tower, 106 South Main Street, Suite 1100, Akron, Ohio, on Tuesday, the 19th day of February, 2008, commencing at 9:50

1 o'clock a.m.

2 - - -

3

4 **APPEARANCES:**

5

6 On Behalf of the Plaintiff:

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13

14 On Behalf of the Defendant:

15 BROUSE McDOWELL

16 BY: John M. Skeriotis Attorney at Law

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## I N D E X

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1                   (Thereupon, Plaintiff's Exhibit 1 of  
2                   the R.W. Vitale deposition was marked  
3                   for purposes of identification.)

4                   ROBERT W. VITALE  
5   of lawful age, a witness herein, having been  
6   first duly sworn, as hereinafter certified,  
7   deposed and said as follows:

8                   EXAMINATION

9   **BY MR. DOSEK:**

10   **Q.**   State your full name, please.

11   **A.**   Robert William Vitale.

12   **Q.**   You are not related to Dick, are you?

13   **A.**   No.

14   **Q.**   You have probably never been asked that  
15   before, have you?

16   **A.**   No.

17   **Q.**   Sir, what is your date of birth?

18   **A.**   August 31st, '42.

19   **Q.**   Have you ever had a deposition taken  
20   before?

21   **A.**   I have.

22   **Q.**   How many times?

23   **A.**   Five.

24   **Q.**   When is the last time?

25   **A.**   About, I think, three years ago.

1 Q. Okay. Were those previous depositions that  
2 you have given in connection with your business?

3 A. Correct.

4 Q. Let me just give you a little bit of  
5 background, so that we have our ground rules set  
6 for today.

7 I will be asking you a series of questions,  
8 and everything that we say here today is going  
9 to be recorded by the court reporter. You  
10 understand that, don't you?

11 A. Correct.

12 Q. And because she is taking down everything  
13 that we say, it is difficult for her to record  
14 two people talking at one time. So I am going  
15 to ask you to try to wait until I am finished  
16 with a question before you give me an answer. I  
17 will try to wait until you are finished with the  
18 answer before I ask the next question. Fair  
19 enough?

20 A. Fair enough.

21 Q. Also, because she is taking down what we  
22 say today, it is important that we speak in  
23 verbal words, rather than a shake of the head or  
24 a nod of the head, which is more common in  
25 everyday discourse. You understand that, don't

1     you?

2     **A.**    Yes.

3     **Q.**    You took an oath swearing to tell the  
4     truth, to truthfully answer the questions that I  
5     ask you today. You understand that, don't you?

6     **A.**    Yes.

7     **Q.**    Have you ever testified in court before?

8     **A.**    Yes.

9     **Q.**    You understand that the oath you took today  
10    is the same oath that you would take in a court  
11    of law?

12    **A.**    Yes.

13    **Q.**    If I ask you any question today that you  
14    don't understand -- and, frankly, that is  
15    likely -- please ask me to rephrase the question  
16    or ask it in a different way so that when you  
17    give me an answer, I will know that it is an  
18    answer to a question that you do understand.

19    Fair enough?

20    **A.**    Fair enough.

21    **Q.**    Then when we are done today, we will know  
22    that all of the answers that you have given me  
23    have been truthful answers to questions that you  
24    understood. Okay?

25    **A.**    Yes.

1 Q. Okay. What is your occupation?

2 A. CEO of Midwest Industrial Supply,  
3 Incorporated.

4 Q. How long have you held that position?

5 A. From the time I started the business in  
6 1975.

7 Q. Give me a summary of your educational  
8 background, beginning with your graduation from  
9 high school.

10 A. I graduated from Central Catholic High  
11 School in Canton in 1960, went to St. Joseph's  
12 College in Rensselaer, Indiana, for a year. I  
13 transferred to Walsh College in Canton, Ohio,  
14 and attended there approximately three years or  
15 four.

16 I have attended Harvard Business School's  
17 program known as OPM, Owners and Presidents  
18 Management Program.

19 Q. Did you attain any kind of degree or  
20 certification from St. Joseph's?

21 A. No.

22 Q. Did you attain any sort of degree or  
23 certification from Walsh College?

24 A. No.

25 Q. What was your course of study at



1 sentence that reads, "Soilworks has used  
2 Midwest's Marks in commerce in an attempt to  
3 divert sales and goodwill from Midwest, thereby  
4 causing confusion, mistake and/or deception as  
5 the affiliation, connection or association of  
6 Soilworks with Midwest and/or the origin,  
7 sponsorship or approval of Soilworks' products,  
8 services or commercial activities from Midwest."  
9 Did I read that correctly?

10 **A.** Yes.

11 **Q.** Which of Midwest's marks that are shown in  
12 paragraph 7 on the preceding page is it that you  
13 are accusing Soilworks of using?

14 **A.** For instance, the mark Soil-Sement, and  
15 without review, I couldn't identify which of the  
16 others, just from recall. I could find that for  
17 you.

18 **Q.** But you do have recollection as you sit  
19 here today of Soilworks having used the term  
20 "Soil-Sement"?

21 **A.** Yes.

22 **Q.** And where did you see or hear that?

23 **A.** Soilworks was using Soil-Sement in its meta  
24 tagging of its Web site.

25 **Q.** Are they still doing that, to your

1 knowledge?

2 A. I don't know.

3 Q. Okay. And was Midwest Industrial Supply at  
4 one point in time using Soilworks' meta tags in  
5 its Internet advertising?

6 MR. SKERIOTIS: Objection.

7 THE WITNESS: I don't recall.

8 BY MR. DOSEK:

9 Q. You don't know one way or another?

10 A. I don't recall that we did. If we did, it  
11 would have been sort of a tit for tat. But I  
12 don't recall and I don't think we did.

13 Q. Do you recall -- and you may have already  
14 answered this -- but do you recall any other of  
15 Midwest's marks, other than Soil-Sement, which  
16 you are claiming that Soilworks has used?

17 A. I don't recall.

18 Q. Paragraph 14 on page 7 of Exhibit 4 states,  
19 "Soilworks has also made false or misleading  
20 statements of fact in its commercial  
21 advertisements and promotions that misrepresent  
22 the nature, characteristics, qualities and  
23 origin of its own services, products or  
24 commercial activities."

25 Do you see that?

## C E R T I F I C A T E

STATE OF OHIO, )  
                  ) SS:  
SUMMIT COUNTY, )

I, Binnie Purser Martino, a Registered Diplomat Reporter, Certified Realtime Reporter and Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, ROBERT W. VITALE, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to Stenotype in the presence of said witness, afterwards prepared and produced by means of Computer-Aided Transcription and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, employee of or attorney for any party or counsel, or otherwise financially interested in this action.

I do further certify that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Akron, Ohio on this 26th day of February, 2008.

*Binnie Purser Martino*

\_\_\_\_\_  
Binnie Purser Martino, RDR, CRR

My commission expires June 27, 2009.

- - -

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